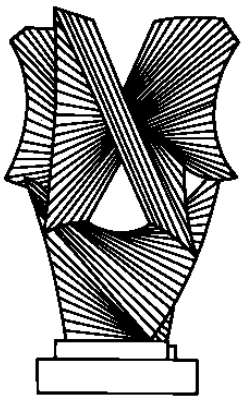
2004

Unconstitutional Police Searches and Collective Responsibility

Bernard E. Harcourt

CHICAGO

PUBLIC LAW AND LEGAL THEORY WORKING PAPER NO. 66



UNCONSTITUTIONAL POLICE SEARCHES AND COLLECTIVE RESPONSIBILITY

Bernard E. Harcourt

THE LAW SCHOOL
THE UNIVERSITY OF CHICAGO

June 2004

Forthcoming, *Criminology and Public Policy*, 2004
The working paper can be downloaded without charge at
http://www.law.uchicago.edu/academics/publiclaw/index.html
and at The Social Science Research Network Electronic Paper Collection:
http://ssrn.com/abstract_id=554642

Draft: May 23, 2004
Comments welcome at bharcourt@law.uchicago.edu

Unconstitutional Police Searches and Collective Responsibility:

Then the police officer told the suspect, without just cause,
"I bet you are hiding [drugs] under your balls. If you have drugs
under your balls, I am going to fuck your balls up"[1]

Bernard E. Harcourt[2]

Jon Gould and Stephen Mastrofski document astonishingly high rates of unconstitutional police searches in their groundbreaking article "Suspect Searches: Assessing Police Behavior Under the U.S. Constitution" published in *Criminology & Public Policy* (2004). By their conservative estimate, 30 percent of the 115 police searches they studied—searches that were conducted by officers in a department ranked in the top 20 percent nationwide, that were systematically observed by trained field observers, and that were coded by Gould, Mastrofski and a team including a state appellate judge, a former federal prosecutor, and a government attorney—violated Fourth Amendment prohibitions on searches and seizures.

The vast majority of the unconstitutional searches—31 out of 34—were invisible to the courts, having resulted in no arrest, charge, or citation. In fact, the rate of unconstitutional searches was highest for suspects who were released—44 percent versus 7 percent of arrested or cited suspects. Focusing exclusively on stop-and-frisk searches, an even higher proportion—46 percent—were unconstitutional. Moreover, 84 percent of the searches involved black suspects. The searches were conducted and observed in the early 1990s in the midst of an ongoing war on drugs, during a period of increased police discretion nationwide. The study paints a troubling picture of police practices and raises a number of difficult questions about discretionary policing.

Gould and Mastrofski's findings have a disturbingly familiar ring to them. In a somewhat analogous context—stop-and-frisk searches conducted in New York City during

[1] Jon B. Gould and Stephen D. Mastrofski, "Suspect Searches: Assessing Police Behavior," Appendix—Sample Search Narratives and Coding, *Criminology & Public Policy* __:__ (2004) (this is an excerpt from field notes recording a conversation between a police officer and a suspect).

the late 1990s—research similarly revealed high levels of unconstitutional searches. New York Attorney General Elliot Spitzer, in conjunction with Jeffrey Fagan and Columbia University's Center for Violence Research and Prevention, reviewed documentation of more than 15,000 NYPD stop-and-frisk reports, and found that, citywide, 15.4 percent of the reports contained factual bases that were not sufficient to justify a stop and another 23.5 percent stated inadequate factual bases to allow a supervisor to determine whether there were sufficient facts to justify a stop—for a total of approximately 39 percent questionable searches.[3]

To be sure, Gould and Mastrofski have raised the evidentiary bar with their article *Suspect Searches* by drawing on one of the first studies to conduct systematic physical observation of police searches. Rather than being based on written police reports—which raise clear issues of reliability—their new findings are drawn from the field notes of trained observers who accompanied and directly observed police officers on patrol. Any bias in this method—specifically, reactivity effects from direct observation of police practices—would likely tend to minimize a possibly higher real rate of unconstitutional searches.[4] Nevertheless, Gould and Mastrofski's empirical findings corroborate overall Spitzer's conclusions: about a third of police discretionary searches are constitutionally suspect.

The public policy debates that Gould and Mastrofski's article are likely to ignite will also, in all probability, have a familiar ring to them as well. The debates have been rehearsed in a number of policing controversies—not just stop-and-frisk policing on New York City streets,[5] but also racial profiling on the nation's highways[6] and drug-courier profiling at

---

[2] Professor of Law, The University of Chicago.

[3] *See* Civil Rights Bureau, Office of the New York Attorney General, *The New York City Police Department's "Stop & Frisk" Practice: A Report from the Office of the Attorney General* (December 1, 1999), at pp. 160B170.

[4] In addition, Gould and Mastrofski bent backwards to minimize the risk of overstating the rate of unconstitutional searches by reading any factual and legal inferences in favor of the police while coding and consistently giving the police officers the benefit of any doubt in the coding process. *See* Gould and Mastrofski 2004:*19.

[5] *See* United States Commission on Civil Rights, *Police Practices and Civil Rights in New York City* (August 2000); New York Police Department, *NYPD Response to the Draft Report of the United States Commission on Civil Rights—Police Practices and Civil Rights in New York City* (2000); Heather MacDonald, "America's Best Urban Police Force," *City Journal*, Volume 10, No. 3 (Summer 2000).

[6] *See* Jerome Skolnick and Abigail Caplovitz, "Guns, Drugs and Profiling: Ways to Target Guns and Minimize Racial Profiling," in *Guns, Crime, and Punishment in America* (Bernard E. Harcourt, ed.) (New York: New York University Press 2003); Samuel R. Gross and Katherine Y. Barnes, "Road Work: Racial Profiling and Drug Interdiction on the Highway," *Michigan Law Review*, 101(3):_____ (2002); John

airports and borders.[7] Civil-liberties-attentive law enforcement officials will probably call for more dialogue and research "in the best spirit of public policy discussion—without rancor or recrimination,"[8] as Attorney General Spitzer recommends in the NYPD context. In this vein, there will also be calls for more "robust scholarly discussion and debate" over topics such as the "training of managers, supervisors, and line officers regarding 'stop & frisk'" and the "methods for supervising officers who apply the technique on the street."[9]

Staunch law-and-order advocates will challenge the findings and place them squarely in the larger context of *crime reduction*. As Heather MacDonald of the Manhattan Institute suggests in the New York City context, these types of studies and the press more generally "specialize[] in blissfully ignorant innuendos about stop and frisks to tar the [police]."[10] Or, as former New York police commissioners William Bratton and Howard Safir argue in the NYPD context, any apparent problem with unconstitutional searches can be attributed to sharply increased rates of civilian-police contact associated with heightened discretionary policing and growing police forces. On a per contact basis, the numbers are very low.[11]

Civil rights organizations, such as the United States Commission on Civil Rights, the ACLU, and Amnesty International, will call for an end to unconstitutional searches and racial profiling, enhanced monitoring and training, better recruitment, and increased resources for the Civilian Complaint Review Board.[12] Progressive academicians may call for an outright ban on discretionary stop-and-frisk policing or its replacement with mandatory randomized searches, and other more radical scholars will question the very idea of criminal profiling.[13]

Knowles, Nicola Persico, and Petra Todd, "Racial Bias in Motor Vehicle Searches: Theory and Evidence," *Journal of Political Economy*, 109(1): 203B229 (2001). For an overview and assessment of the empirical studies and policy arguments, *see generally* Bernard E. Harcourt, "Rethinking Racial Profiling: A Critique of the Economics, Civil Liberties, and Constitutional Literature and of Criminal Profiling More Generally," *University of Chicago Law Review*, 71: _____ (forthcoming Fall 2004).

[7] For discussion of the drug courier profile and its public policy implications, *see generally* Bernard E. Harcourt, "From the Ne'er-do-Well to the Criminal History Category: The Refinement of the Actuarial Model in Criminal Law," *Law and Contemporary Problems*, 66(3):99B151 (2003).

[8] Civil Rights Bureau 1999:175.

[9] Civil Rights Bureau 1999:176.

[10] MacDonald 2000.

[11] *See* William Bratton with Peter Knobler, *Turnaround: How America's Top Cop Reversed the Crime Epidemic*, 291 (New York: Random House 1998); *NYPD Response to the Draft Report* 2000:7.

[12] *See, e.g.*, United States Commission on Civil Rights 2000:82B39B40, 80B84, 107B108.

[13] My colleague at the University of Chicago, Tracey Meares, is working on a paper that argues against discretionary policing and in favor of non-discretionary type searches, such as mandatory road

These positions in our public policy debates are familiar. If anything, a bit too familiar. In this essay, I would like to reframe the debates and in the process destabilize these positions. To make them a little less comfortable, a little less sanitized. To start to expose the real stakes. To begin to explore our own responsibility as observers, as social scientists, as commentators, as policy makers, and, yes, as public citizens. In effect, I would like to probe *our own participation* in these police searches. Buried in the Appendix to Gould and Mastrofski's article is a field note about one particular police-civilian encounter that raises especially troubling questions about social science, public policy, and citizenship. Let's start, then, with this field note in the Appendix.

I.

The lead police officer is described in very generic terms. He is a "white cop in his late twenties." Three other police officers are assisting him on the scene, only one of whom is identified, also in generic terms, also as a "white male in his late twenties." The officers have stopped a suspect who was riding a bike. The suspect is identified in the field notes, not surprisingly, as "a black male in his late twenties." The police have searched his pockets, his person, his backpack. They have not found anything—no drugs, no gun, no contraband. No evidence of crime. Nothing. But they decide to search a little further. They decide to look a little deeper. They decide to check under his testicles.

According to the trained field researcher physically observing the encounter, the young white police officer tells the young black suspect: "I bet you are hiding [drugs] under your balls. If you have drugs under your balls, I am going to fuck your balls up."[14] The police officer then tells the young black suspect to "get behind the police car, and pull his pants down to his ankles." The white police officer puts on "some rubber gloves." He then begins "feeling around" the black suspect's testicles. Again, he comes up empty handed. No drugs. No contraband. Just a black man's testicles. So he decides to search even further.

And he says to the black man, now with even less valid suspicion: "I bet you are holding them in the crack of your ass. You better not have them up your ass." The black

---

blocks. For a paper challenging the very idea of criminal profiling, *see* Bernard E. Harcourt, "Rethinking Racial Profiling," (2004).

[14] Gould and Mastrofski 2004.

man, at this point very compliant, “bent over, and spread his cheeks.” The white cop, still with his rubber gloves, then “put his hands up C1's rectum.” [C1 is the anonymous code for the suspect—as in “Citizen 1" or C1 for short]. But the white cop finds nothing. No drugs. No contraband. Just a black man’s empty rectum.

The citizen pulls his pants back up. The first cop on the scene tells him that he matched the description from a tip the police had received. [Note: “there was simply no evidence elsewhere in the report that the officers had ever received the call to which they referred,” Gould and Mastrofski observe. “Moreover, even if they had, an anonymous tip does not in itself justify a body cavity search (*Florida v. J.L.*, 2000)”]. “Besides,” the officer adds, “you are so nervous, I would bet that you have some drugs on you too. But then again, I would be nervous too if I was surrounded by four cops.”

The citizen repeats, for the fourth or fifth time, that he does not have any dealings with drugs, that “he didn’t use or sell drugs.” When he is told that he can leave, the citizen says “thank you” and takes off on his bike. For his part, the researcher walks back to the patrol car with the first cop on the scene, whose last words are “I know he had some drugs.”

II.

It may be worth stopping here for a moment to experience this encounter in real time. On a conservative estimate—assuming, for instance, that the police officer had rubber gloves right handy—the strip and cavity search took at least ninety seconds. That is a very conservative estimate, and yet it is a long time in which to ruminate, day dream, think, desire. What must have been going through the officer’s mind when he started putting on those rubber gloves? Do you think that he felt bad that he was asking a grown man to drop his pants in public in order to feel his testicles? Do you think he was thinking to himself, “Man, I hate this job! I can’t believe I have to stick my hand up this guy’s ass.” Or did he feel entirely self-righteous, proud that he was so selflessly promoting the public interest? Or alternatively did he experience a genuine moral dilemma about having to employ dirty means to achieve good ends—what we might call, after Carl Klockars, “The Dirty Harry

Problem"[15]? Or was he just so convinced of the suspect's guilt that he put all thoughts aside, that he wasn't even thinking?

Did he feel guilty in any way about the racial dimension of the encounter? Did he feel embarrassed about being white and putting his hands up a black man's rectum? Or did that excite him? Do you think he experienced some pleasure at the idea of penetrating a black man? Of course, we do not know what he was thinking or feeling. We can only speculate. Do you think that he felt a spark, a *frisson*, some power, a feeling of domination when the citizen bent over in public and spread his buttocks cheeks for him? Do you think the cop experienced any sexual pleasure? Did he give it a good look? Was it a gentle caress or a punishing grip? Was he acting out some kind of fantasy? Was he hoping that the citizen might be complying out of a hidden desire to be dominated? Or instead, was the cop disgusted by the whole thing? Was it his disgust that attracted him to it? Was he punishing the black man? Was he intentionally trying to hurt him? (After all, wouldn't it hurt to have someone stick a rubber glove up your rectum like that?) Was the cop inflicting this on himself—or on the citizen? Who was he punishing?

What about the three back-up police officers? What were they thinking as they watched their white supervisor, their fearless leader sticking his hand up the black man's rectum in public? Were they taking mental notes—"Okay, so this is how you do it. Let's see now. Okay. Then you put your fingers up his ass." Were they wondering to themselves whether their supervisor was nuts? Or a sexual pervert? Were they thinking of intervening and suggesting that there was no valid basis for further searching the suspect? Were they concerned that intervening might hurt their careers? Or were they envious—jealous that the supervisor got to penetrate the black man and not them. Were they bonding, as males, as delinquents? Was this some kind of initiation ritual? Was it any different than a gang initiation rape? Or was it a heroic act—after all, who wants to stick their hand up someone's rectum to wage war on drugs? Or was this so routine that they didn't even pay attention? Was it a cigarette break? A safe moment during an otherwise dangerous day? Or was it a moment of comic relief? Was it just some good old-fashioned healthy fun and games?

---

[15] *See* Carl B. Klockars, "The Dirty Harry Problem," 428B438, in *Thinking about Police: Contemporary Readings*, ed. Carl B. Klockars (New York: McGraw-Hill Book Company 1983); *see also* Stephen D. Mastrofski and Craig D. Uchida, "On Dirty Hands and Definitions: A Rejoinder," *Journal of Research in Crime and Delinquency* 30(3):354B368 (August 1993).

What about the citizen, what on earth was he thinking and feeling? Do you think he felt humiliated about having to drop his pants in public? Or did he just think to himself, this is simply part and parcel of being a young black man in America today? What did he mean when he said "thank you"? Did it hurt? Could it possibly feel good? Had he done this before? Had anyone told him before what you are supposed to do if four cops stop you and tell you to spread your cheeks? Was he angry? Sad? Depressed? Forgiving? Vengeful? Understanding? Did he think to himself, "One day, white man, your time will come. I will get you back—when you least expect it"? How did he feel when he got home that night? What did he tell his kids? What did he do to his sex partner?

What about the trained social scientist, the observer, the researcher there on site, taking field notes, conducting systematic observation? What was s/he thinking as s/he observed the police officer "put his hands up C1's rectum"? Did s/he take a good look? Was s/he curious as to how a police officer searches someone's balls? Or did s/he close her/his eyes and think "My God, what is going on here?" Did s/he experience anger? Attraction? Repulsion? Arousal? An adrenaline rush? Did s/he try to intervene and tell the police officers that there was no evidence of a tip? Or that a tip would not justify such an intrusive search anyway? Was s/he concerned that this would jeopardize the data collection? Or was s/he projecting being the police officer, having the power, taking control, putting a hand up C1's rectum?

III.

The questions abound. And they all tend toward one central inquiry: to what extent are these various actors *responsible* for the cavity search? Of course, the lead police officer bears much responsibility. It is interesting to note, in this respect, that Gould and Mastrofski conducted qualitative review of the worst offenders and found that "None appeared to be angry, cynical, or the composite of a disillusioned officer with an axe to grind." "All were well regarded by their peers and supervisors and expressed a desire to establish strong bonds with neighborhood residents and to treat all citizens, including suspects, with a respectful demeanor."[16] (We might ask here whether the police officers had voluntarily segregated into these cohesive units and whether their strong peer bonds actually hid sharp tensions along

[16] Gould and Mastrofski 2004:*35

other dimensions. In the policing context, for instance, there is a lot of voluntary racial segregation of police units).

What about the responsibility of the other police officers watching? Should they have said something to defuse the situation—something like, "Hey, Sergeant, there ain't nothing here! Let's let the guy go! We'll get him next time!" Why didn't they intervene? Were they worried about getting fired? What was their rank? How much job security did they have? What would lead them to place their own self-interest over the welfare of the citizens they are sworn to protect? At what point and at what cost did they lose their ideals?

And did race play a role in the decision of the three back-up police officers not to intervene? Gould and Mastrofski surprisingly minimize the racial dimensions of these searches. They bend backward to emphasize the lack of a significant statistical relationship between race and the unconstitutionality of searches. "The absence of significant effects for wealth and race deserve special note, inasmuch as other research has shown these variables to influence justice outcomes," Gould and Mastrofski write.[17] But the fact is that *eighty-four percent* of their sample—96 of the searches studied—involved black suspects. Although we do not know the exact demographic breakdown for Middleberg, the fictitiously-named medium-size American city where the study was conducted—all we do know is that "many of the city's residents were African American, and many experienced concentrated disadvantage"[18]—it is hard to believe that the police could reach 84 percent searches of black suspects without some racial profiling. Might that have played a role or contributed in any way to the passivity of the three other police officers?

What about the social scientist who is witnessing, observing, and documenting this incident—taking notes, making a recording, memorializing the interaction? Is s/he responsible in any way for this incident? Does the social scientist have any obligation to step out of the scientific role and actively intervene? To breach the code of social scientific objectivity and prevent the search? Or to report it? Let's put aside personal ethics for a minute and focus on the more formal institutional duties that the researcher may have had. There are, aren't there, some legal responsibilities that attach here? Among social scientists, it might be worth pausing here for a moment and exploring the question.

---

[17] Gould and Mastrofski 2004:*32.
[18] Gould and Mastrofski 2004:*12.

Without doubt, the actions of the police officer involve bodily harm to the suspect. They are physically injurious, dehumanizing, and degrading at least with regard to one of the subjects of the research. In fact, the police conduct may well constitute a felony. In a number of jurisdictions, sexual battery includes anal penetration of another by any object without that person's consent.[19] This is precisely the statutory definition in Florida for instance, *see Fla. Stat.* '794.011(1)(h) (2004), where it is specifically designated a felony in the first degree "when the offender is a law enforcement officer. . . and such officer . . . is acting in such a manner as to lead the victim to reasonably believe that the offender is in a position of control or authority as an agent or employee of government." *Fla. Stat.* '794.011(4)(g) (2004). In Florida, it is punishable by a term of imprisonment of up to 30 years for a first offense. *Fla. Stat.* '794.011775.082(3)(b) (2004).[20]

Given that the actions of the lead police officer cause bodily harm—and may amount to a felony—the social scientist may very well have an obligation to report the incident to the university and to law enforcement officials.[21] First, with regard to the university, the field observation study underlying the Gould and Mastrofski article undoubtedly required human subjects committee (IRB) approval at the university level. A project such as this, even though it involves only "observation of public behavior," would not ordinarily be exempt from review because the disclosure of information beyond the research community "could reasonably place the subjects at risk of criminal or civil liability or be damaging to the subjects' financial standing, employability, or reputation."[22] This is straight from the Code of

---

[19] It will depend on the jurisdiction, of course, and we are not told where the fictitiously-named city of Middleberg is actually located. I have chosen Florida purely hypothetically.

[20] In Florida, consent is defined strictly. Consent requires "intelligent, knowing, and voluntary consent and does not include coerced submission." *Fla. Stat.*§794.011(1)(a) (2004). For prosecutions against police officers under (4)(g), "acquiescence to a person reasonably believed by the victim to be in a position of authority or control does not constitute consent, and it is not a defense that the perpetrator was not actually in a position of control or authority if the circumstances were such as to lead the victim to reasonably believe that the person was in such a position." *Fla. Stat.*§794.011(9) (2004).

Another example would be California. Under the California Penal Code, Chap. 5, §289, forcible acts of sexual penetration include, at section (k)(1), "the act of causing the penetration, however slight, of the genital or anal opening of any person . . . by any foreign object, substance, instrument, or device, or by any unknown object." When the act "is accomplished against the victim's will by threatening to use the authority of a public official to incarcerate, arrest, or deport the victim or another, and the victim has a reasonable belief that the perpetrator is a public official," then it is punishable by imprisonment in the state prison for a period of three, six, or eight years. Cal. Penal Code §289(g) (2004).

[21] I have no idea whether the researchers did or did not report this incident. I can only assume that they did, but I have no knowledge whatsoever.

[22] This is from the Manual of Procedures of the University of Arizona Human Subjects Protection

Federal Regulations concerning the protection of human subjects by the United States Department of Health and Human Services (DHHS) and is usually incorporated *verbatim* in university IRB protocols.

As a result, the actions of the lead police officer would likely have to be reported to the university committee. The typical university approval requires as much. Here, for instance, is the actual text from a letter granting approval for a research project from the human subjects committee at a top American research university:

> Approval is granted with the understanding that no further changes or additions will be made . . . without the knowledge and approval of the Human Subjects Committee and your College or Departmental Review Committee. *Any research related physical or psychological harm to any subject must also be reported to each committee*.[23]

The failure to comply with these requirements could very well lead to academic discipline.

As an aside, it is worth remembering that the regulation of research concerning human subjects is no trivial affair. It had its origins in the Nuremberg trials. As the *IRB Guidebook* of the Office for Human Research Protections of the DHHS explains:

> The modern story of human subjects protections begins with the *Nuremberg Code*, developed for the Nuremberg Military Tribunal as standards by which to judge the human experimentation conducted by the Nazis. The Code captures many of what are now taken to be the basic principles governing the ethical conduct of research involving human subjects. The first provision of the Code states that "the voluntary consent of the human subject is absolutely essential." Freely given consent to participation in research is thus the cornerstone of ethical experimentation involving human subjects. The Code goes on to provide the details implied by such a requirement: capacity to consent, freedom from coercion, and comprehension of the risks and benefits involved. Other provisions require the minimization of risk and harm, a favorable risk/benefit ratio, qualified investigators using appropriate research designs, and freedom for the subject to withdraw at any time. Similar recommendations were made by the World Medical Association in its *Declaration of Helsinki: Recommendations Guiding Medical Doctors in Biomedical Research Involving Human Subjects*, first adopted by the 18th World Medical Assembly in Helsinki, Finland, in 1964, and subsequently revised by the 29th World Medical Assembly, Tokyo, Japan, 1975, and by the 41st World Medical Assembly, Hong

---

Program, Part 4.(2), but it is lifted directly from the Code of Federal Regulations concerning the protection of human subjects from the United States Department of Health and Human Services. *See* 45 C.F.R. Sec. 46.101 (b)(2).

[23] This is the actual text from a letter of approval for research at the University of Arizona.

> Kong, 1989. The Declaration of Helsinki further distinguishes therapeutic from nontherapeutic research.[24]

Now, in addition to the university IRB, the researcher who observed the improper cavity search may also need to report the incident to law enforcement authorities.[25] In a number of states, it is a misdemeanor to fail to report a crime that exposes a victim to bodily harm. In Florida again, a person who "has reasonable grounds to believe that he or she has observed the commission of a sexual battery" and who has "the present ability to seek assistance for the victim or victims by immediately reporting such offense to a law enforcement officer," but fails to seek assistance, is guilty of a misdemeanor of the first degree punishable by a term of imprisonment of up to a year for a first offense. *Fla. Stat.* ' 794.027 and '775.082 (2004).

Should the social scientist observer have intervened or later reported this incident?[26] If s/he did not, was it because it would interfere with the research? Because it might have jeopardized this data collection? Because it might have prevented any further cooperation from this police department? Because it might discourage other police departments from allowing systematic observation in the future? Because it might impair our ability, as social scientists, to collect this information? Is the cavity search just the collateral damage inevitably associated with social science—the cost of knowledge? The cost of increasing our collective awareness about police practices? Did the researcher just sacrifice this black man for the betterment of social science and public policy?

Naturally, these questions raise a host of issues regarding the potential conflict of interest that the researcher may have experienced during the cavity search—issues close to, though somewhat distinct from the "dirty hands" dilemma that Stephen Mastrofski, Carl

---

[24] *Protecting Human Research Subjects: Institutional Review Board Guidebook,* "Introduction" (available at http://ohrp.osophs.dhhs.gov/irb/irb_introduction.htm).

[25] Here, for instance, is the actual text of a letter from a district attorney regarding a request for immunity for a research project:

> We have reviewed your request for confidentiality in your interviews with research subjects for the above study. We agree to such confidentiality except where information may come to light about homicides, other serious crimes or crimes involving serious injury to others.
>
> Therefore, if your research subjects should admit to homicide or other serious offenses as listed in [the state's penal code] or one involving serious injury to another, should this information be disclosed to us in any way, we would be required to act on the matter as we deem appropriate and proper.

[26] Again, I have no knowledge whether s/he did. I am discussing this as a pure hypothetical matter.

Klockars, and others have debated.[27] The "dirty hands" dilemma, in its purest form, presents a challenge when the social scientist makes public policy recommendations. It emphasizes that the researcher is responsible for any harm that the policies may produce. Here, we are dealing with a slight variation on the theme, one that focuses on an earlier point in time. The question here is whether the research *itself* presents a moral dilemma. Does the collection of data require complicity with the delinquent police conduct? Do we have to dirty our hands and not intervene *so that* we can obtain the data? And at what price? Do we self-censor our questions, our analyses, our *conclusions* so as not to alienate the police officer or the police department? Do we have to "get in bed" with the police so that they allow us to ride along and observe their daily practices? Did the researcher here stop her or himself from intervening precisely in order to maintain credibility with the police? And will this affect the way the social scientist goes about doing research in the future? Is this the cost of getting this data?

And what about us—me the author and you the reader? What is our responsibility as consumers of this research, as users of this social science? What is my accountability as author of this essay discussing Gould and Mastrofski's article? Am I taking advantage of the black suspect? Here we are, debating the study in an academic journal, gaining reputations as thoughtful scholars, taking positions as policy advisers—but are we just observing sexual humiliation and taking advantage of it? What are *we* feeling as we read the narrative? Are we shocked, amused, disgusted, angered, satisfied, pleased? Do we feel guilt about the racial dimensions? Does it confirm what we suspected? Or is there cognitive dissonance? Is it incredible? Unbelievable? False? Unfair? Do we take responsibility for the actions of the

[27] There are, in reality, three "dirty hands" problems that we need to distinguish. The first is the "Dirty Harry Problem" that Carl Klockars writes about (Klockars 1983). This first problem concerns the use of dirty means by a police officer to promote a good end. Then, second, there is the moral dilemma of the social scientist making policy recommendations: the fact is that the policy recommendations may create some harm, and in that sense the social scientist will have "dirty hands." As Lawrence Sherman explains, there are moral dilemmas when we apply social science to policy analysis. "These dilemmas make social science a morally 'dirty' means to a just and good end—a less violent world. It is a 'dirty' means because recommendations based on it may do some harm, even though the odds are against it." Lawrence W. Sherman, "Dirty Hands and Social Science," *Journal of Research in Crime and Delinquency* 30(3):362B364 (August 1993). This is the "dirty hands" problem that Mastrofski writes about in his rejoinder (Mastroksfi and Uchida 1993). The third is the one I am interested here: how police researchers may have to "get in bed" with the cops in order to obtain their data—how they might have to self-censor their questions and analyses for fear of being shut out of the data. This is another form of "dirty hands" that has even more detrimental effects on the social science and policy analysis because it corrupts before anyone has the opportunity to formulate policy proposals.

police officer? Or do we assume that he was right—that the suspect probably had drugs on him, somewhere, maybe deeper?

Are we—*you and me*—responsible in any way for this body cavity search?

IV.

The answer is "yes". Inevitably. We are responsible. We have chosen this cavity search and others like it. It is ours. After all, it does not come as a surprise, does it? It is not completely unexpected, not even surprising that the police would bend the constitution from time to time when conducting discretionary policing. We know it. We expect it. Discretionary policing comes at a cost—and we knew it from the beginning. It was embedded in the very idea. Recall the original *Broken Windows* essay. How was it, after all, that the police dealt with the disorderly? "In the words of one officer," James Q. Wilson and George L. Kelling wrote, "'We kick ass.'"[28] As Wilson and Kelling explained elsewhere in *Broken Windows*, the police "rough up" young toughs, and arrest on suspicion.[29] George Kelling adds, fourteen years later:

> Another officer in Chicago described in similar terms how he dealt with gang members who would not follow his orders: "I say please once, I say please twice, and then I knock them on their ass." The officer meant it: although a courteous and generally congenial man, he had grown up in Chicago's public housing developments and was not prepared to stand by and watch gangs terrorize his family, friends, and neighbors.[30]

Order-maintenance policing comes with a heavy price tag. Stephen Mastrofski was one of the first to point this out. Writing as early as 1988, Mastrofski emphasized that "One of the most recent attempts to assess the impact of aggressive order maintenance indicated that it contributed to increased criminal victimization and citizen dissatisfaction, while fear of crime and residents' perceptions of disorder remained unaffected."[31]

---

[28] James Q. Wilson and George L. Kelling, "Broken Windows: The Police and Neighborhood Safety," *Atlantic Monthly*, March 1982, 29B38, at p. 35. For a lengthy discussion of this, *see* Bernard E. Harcourt, *Illusion of Order: The False Promise of Broken Windows Policing* (Cambridge MA: Harvard University Press 2001) at pp. 127 et seq.

[29] Wilson & Kelling 1982:33.

[30] George L. Kelling & Catherine M. Coles, *Fixing Broken Windows: Restoring Order and Reducing Crime in Our Communities* (New York: Free Press 1996), at p. 166.

[31] Stephen D. Mastrofski, "Community Policing as Reform: A Cautionary Tale," 47B67, in *Community Policing: Rhetoric or Reality*, eds. Jack R. Greene and Stephen D. Mastrofski, (New York: Praeger 1988), at p. 54.

In this sense, we choose our forms of disorder. We choose our crimes. By engaging in an aggressive war on drugs through discretionary stop-and-frisk strategies, for instance, we are choosing this sexual battery and others. We can estimate how many there will be. We can predict, using actuarial models, how many C1's will have to drop their pants and spread their cheeks in public. It is a form of collateral damage that we can come to expect. What we want most, of course, is to keep it out of sight and out of mind. To deliberately *not* know it. To *not* see it, *not* hear it, *not* think about it. It is, after all, extremely uncomfortable—especially for the tender-hearted among us. But it is predictable. It is to be expected.

In the end, *we* are responsible for this sexual battery. By setting our law enforcement priorities and opting for robust discretionary policing, we are choosing to have more of these cavity searches. We can effectively regulate these assaults—more so than other forms of deviance such as drug use or gun-carrying over which we have a little less control. Here we can regulate the amount. We can turn on more discretionary policing, and with it, more unconstitutional searches. We calibrate the amount of this crime. It happens under our watch. It is the product of our choice. *We* put our hand up C1's rectum.

The great illusion is that all we are doing is fighting crime. That crime is out there, that we know what it is, that we simply go after it. This is the deepest fallacy. The fact is, we *make* crime. We decide what to criminalize and enforce and in the very process we allow other forms of deviance to flourish. Unconstitutional police searches are, tragically, but one perfect example. We set our scope on the drug war, we let loose discretionary policing, and we inevitably produce a certain amount—a predictable amount—of improper searches, of sexual batteries, of bodily injury. Sure, we can try to limit them with improved training and more civility. But still, we know they are going to happen. We can even predict how many will happen.

Discretionary policing involves a trade-off—a trade-off that we make with full knowledge. The most important thing in the public policy debates, then, is to decide, with eyes wide open and brutal honesty, how much unconstitutionality we are prepared to live with—how many sexual batteries of black suspects we are willing to perform. We get to decide. *You* get to decide. *You* choose *our* crime. So, how many of these cavity searches will you tolerate in order to pursue the goal of getting drugs off our streets? To get guns off our

streets? And remember, you can't say "none" *if* you want the police to engage in proactive discretionary policing. You would be lying to yourself.

Bibliography

Bratton, William, with Peter Knobler. 1998. *Turnaround: How America's Top Cop Reversed the Crime Epidemic* (New York: Random House).

Civil Rights Bureau, Office of the New York Attorney General. 1999. *The New York City Police Department's "Stop & Frisk" Practice: A Report from the Office of the Attorney General.*

Gould, Jon B., and Stephen D. Mastrofski. 2004. "Suspect Searches: Assessing Police Behavior," *Criminology & Public Policy* __:__.

Gross, Samuel R. and Katherine Y. Barnes. 2002. "Road Work: Racial Profiling and Drug Interdiction on the Highway," *Michigan Law Review*, 101(3):_____.

Harcourt, Bernard E. 2001. *Illusion of Order: The False Promise of Broken Windows Policing* (Cambridge MA: Harvard University Press).

Harcourt, Bernard E. 2003. "From the Ne'er-do-Well to the Criminal History Category: The Refinement of the Actuarial Model in Criminal Law," *Law and Contemporary Problems*, 66(3):99B151.

Harcourt, Bernard E. 2004. "Rethinking Racial Profiling: A Critique of the Economics, Civil Liberties, and Constitutional Literature and of Criminal Profiling More Generally," *University of Chicago Law Review*, 71: _____ (forthcoming Fall 2004).

Kelling, George L. and Catherine M. Coles. 1996. *Fixing Broken Windows: Restoring Order and Reducing Crime in Our Communities* (New York: Free Press)

Klockars, Carl B. 1983. "The Dirty Harry Problem," 428B438, in *Thinking about Police: Contemporary Readings*, ed. Carl B. Klockars (New York: McGraw-Hill Book Company).

Knowles, John, Nicola Persico, and Petra Todd. 2001. "Racial Bias in Motor Vehicle Searches: Theory and Evidence," *Journal of Political Economy*, 109(1): 203B229.

MacDonald, Heather. 2000. "America's Best Urban Police Force," *City Journal*, Volume 10, No. 3.

Mastrofski, Stephen D. 1988. "Community Policing as Reform: A Cautionary Tale," 47B67, in *Community Policing: Rhetoric or Reality*, eds. Jack R. Greene and Stephen D. Mastrofski, (New York: Praeger)

Mastrofski, Stephen D. and Craig D. Uchida. 1993. "On Dirty Hands and Definitions: A Rejoinder," *Journal of Research in Crime and Delinquency* 30(3):354B368.

New York Police Department. 2000. *NYPD Response to the Draft Report of the United States Commission on Civil Rights—Police Practices and Civil Rights in New York City*.

Sherman, Lawrence W. 1993. "Dirty Hands and Social Science," *Journal of Research in Crime and Delinquency* 30(3):362B364.

Skolnick, Jerome, and Abigail Caplovitz. 2003. "Guns, Drugs and Profiling: Ways to Target Guns and Minimize Racial Profiling," in *Guns, Crime, and Punishment in America*, ed. Bernard E. Harcourt (New York: New York University Press).

United States Commission on Civil Rights. 2000. *Police Practices and Civil Rights in New York City*.

United States Department of Health and Human Services. *Protecting Human Research Subjects: Institutional Review Board Guidebook* (available at http://ohrp.osophs.dhhs.gov/irb/irb_introduction.htm).

Wilson, James Q. and George L. Kelling. 1982. "Broken Windows: The Police and Neighborhood Safety," *Atlantic Monthly*, March 1982, 29B38.

Comments should be addressed to:

Bernard E. Harcourt
University of Chicago Law School
1111 East 60th Street
Chicago, IL 60637
bharcourt@law.uchicago.edu

University of Chicago Law School

Public Law and Legal Theory Working Paper Series

1. Cass R. Sunstein and Edna Ullmann-Margalit, Second-Order Decisions (November 1999; *Ethics*, v. 110, no. 1).
2. Joseph Isenbergh, Impeachment and Presidential Immunity from Judicial Process (November 1999; forthcoming *Yale Law and Policy Review* v.18 #1).
3. Cass R. Sunstein, Is the Clean Air Act Unconstitutional? (August 1999; *Michigan Law Review* #3).
4. Elizabeth Garrett, The Law and Economics of "Informed Voter" Ballot Notations (November 1999, *University of Virginia Law Review*, v. 85).
5. David A. Strauss, Do Constitutional Amendments Matter? (November 1999)
6. Cass R. Sunstein, Standing for Animals (November 1999)
7. Cass R. Sunstein, Culture and Government Money: A Guide for the Perplexed (April 2000).
8. Emily Buss, Without Peers? The Blind Spot in the Debate over How to Allocate Educational Control between Parent and State (April 2000).
9. David A. Strauss, Common Law, Common Ground, and Jefferson's Principle (June 2000).
10. Curtis A. Bradley and Jack L. Goldsmith, Treaties, Human Rights, and Conditional Consent (May 2000; *Pennsylvania Law Review* v. 149).
11. Mary Ann Case, Lessons for the Future of Affirmative Action from the Past of the Religion Clauses? (May 2001, *Supreme Court Review*, 2000)
12. Cass R. Sunstein, Social and Economic Rights? Lessons from South Africa (May, 2000).
13. Jill Elaine Hasday, Parenthood Divided: A Legal History of the Bifurcated Law of Parental Relations
14. Elizabeth Garrett, Institutional Lessons from the 2000 Presidential Election (May 2001).
15. Richard A. Epstein, The Allocation of the Commons: Parking and Stopping on the Commons (August 2001).
16. Jack Goldsmith, The Internet and the Legitimacy of Remote Cross-Border Searches (October 2001).
17. Adrian Vermeule, Does Commerce Clause Review Have Perverse Effects? (October 2001).
18. Cass R. Sunstein, Of Artificial Intelligence and Legal Reasoning (November 2001).
19. Elizabeth Garrett, The Future of Campaign Finance Reform Laws in the Courts and in Congress, The William J. Brennan Lecture in Constitutional Law (December 2001).
20. Julie Roin, Taxation without Coordination (March 2002).
21. Geoffrey R. Stone, Above the Law: Research Methods, Ethics, and the Law of Privilege (March 2002; forthcoming *J. Sociological Methodology* 2002).
22. Cass R. Sunstein, Is There a Constitutional Right to Clone? (March 2002).
23. Emily Buss, Parental Rights (May 2002, forthcoming Virginia Law Review).
24. David A. Strauss, Must Like Cases Be Treated Alike? (May 2002).
25. David A. Strauss, The Common Law Genius of the Warren Court (May 2002).

26. Jack Goldsmith and Ryan Goodman, U.S. Civil Litigation and International Terrorism (June 2002).
27. Jack Goldsmith and Cass R. Sunstein, Military Tribunals and Legal Culture: What a Difference Sixty Years Makes (June 2002).
28. Cass R. Sunstein and Adrian Vermeule, Interpretation and Institutions (July 2002).
29. Elizabeth Garrett, Is the Party Over? The Court and the Political Process (August 2002).
30. Cass R. Sunstein, The Rights of Animals: A Very Short Primer (August 2002).
31. Joseph Isenbergh, Activists Vote Twice (November 2002).
32. Julie Roin, Truth in Government: Beyond the Tax Expenditure Budget (November 2002).
33. Cass R. Sunstein, Hazardous Heuristics (November 2002).
34. Cass R. Sunstein, Conformity and Dissent (November 2002).
35. Jill Elaine Hasday, The Principle and Practice of Women's "Full Citizenship": A Case Study of Sex-Segregated Public Education (December 2002).
36. Cass R. Sunstein, Why Does the American Constitution Lack Social and Economic Guarantees? (January 2003).
37. Adrian Vermeule, *Mead* in the Trenches (January 2003).
38. Cass R. Sunstein, Beyond the Precautionary Principle (January 2003).
39. Adrian Vermeule, The Constitutional Law of Congressional Procedure (February 2003).
40. Eric A. Posner and Adrian Vermeule, Transitional Justice as Ordinary Justice (March 2003).
41. Emily Buss, Children's Associational Rights? Why Less Is More (March 2003)
42. Emily Buss, The Speech Enhancing Effect of Internet Regulation (March 2003)
43. Cass R. Sunstein and Richard H. Thaler, Libertarian Paternalism Is Not an Oxymoron (May 2003)
44. Elizabeth Garrett, Legislating *Chevron* (April 2003)
45. Eric A. Posner, Transfer Regulations and Cost-Effectiveness Analysis (April 2003)
46. Mary Ann Case, Developing a Taste for Not Being Discriminated Against (May 2003)
47. Saul Levmore and Kyle Logue, Insuring against Terrorism—and Crime (June 2003)
48. Eric Posner and Adrian Vermeule, Accommodating Emergencies (September 2003)
49. Adrian Vermeule, The Judiciary Is a They, Not an It: Two Fallacies of Interpretive Theory (September 2003)
50. Cass R. Sunstein, Ideological Voting on Federal Courts of Appeals: A Preliminary Investigation (September 2003)
51. Bernard E. Harcourt, Rethinking Racial Profiling: A Critique of the Economics, Civil Liberties, and Constitutional Literature, and of Criminal Profiling More Generally (November 2003)
52. Jenia Iontcheva, Nationalizing International Criminal Law: The International Criminal Court As a Roving Mixed Court (January 2004)
53. Lior Jacob Strahilevitz, The Right to Destroy (January 2004)
54. Adrian Vermeule, Submajority Rules (in Legislatures and Elsewhere) (January 2004)

55. Jide Nzelibe, The Credibility Imperative: The Political Dynamics of Retaliation in the World Trade Organization's Dispute Resolution Mechanism (January 2004)
56. Catharine A. MacKinnon, Directions in Sexual Harassment Law: Afterword (January 2004)
57. Cass R. Sunstein, Black on Brown (February 2004)
58. Elizabeth F. Emens, Monogamy's Law: Compulsory Monogamy and Polyamorous Existence (February 2004)
59. Bernard E. Harcourt, You Are Entering a Gay- and Lesbian-Free Zone: On the Radical Dissents of Justice Scalia and Other (Post-) Queers (February 2004)
60. Adrian Vermeule, Selection Effects in Constitutional Law (March 2004)
61. Derek Jinks and David Sloss, Is the President Bound by the Geneva Conventions? (March 2004)
62. Derek Jinks and Ryan Goodman, How to Influence States: Socialization and International Human Rights Law (March 2004)
63. Eric A. Posner and Alan O. Sykes, Optimal War and *Jus Ad Bellum* (April 2004)
64. Derek Jinks, Protective Parity and the Law of War (April 2004, abstract only)
65. Derek Jinks, The Declining Significance of POW Status (April 2004, abstract only)
66. Bernard E. Harcourt, Unconstitutional Police Searches and Collective Responsibility (June 2004)